

Appl. No.10/627,533
Atty. Docket No. 9332
Amdt. dated 12/07/2007
Reply to Office Action of 09/07/2007
Customer No. 27752

REMARKS

Claim Status

Claims 1-10 are pending in the present application. No additional claims fee is believed to be due. Claims 11-24 have been cancelled without prejudice in response to the restriction requirement of January 16, 2007. Applicants reserve the right to file a divisional for the claims and elements that were subject to the election/restriction requirement of January 16, 2007. Additionally, Claims 2, 3 and 5 have been cancelled without prejudice.

Rejection Under 35 USC §102 Over U.S. Patent Application 2005/0118119

The Office Action rejects claims 1-4 and 7-10 over Stoltz et al., U.S. Patent Application 2005/0118119 ("Stoltz"). The Office Action states that "although the reference does not disclose the elected species of vitamin B3, it does disclose peptides and retinol, which is recited in the instant claims. These species, although not elected, were not deleted from the claim and therefore the rejection encompasses the generic claims. Therefore, the reference does anticipate the claims."

To expedite prosecution, Applicants have amended the skin care active of Claim 1 to vitamin B₃. As stated in both the March 9, 2007 and the September 7, 2007 Office Actions, Stoltz does not disclose vitamin B₃. Therefore, Applicants assert that because the Stoltz does not disclose each and every element of the present invention, the anticipation rejection should be withdrawn.

Rejection Under 35 USC §103(a) Over U.S. Patent Application 2002/0192169

The Office Action rejects claims 1, 5-6 and 8-10 under 35 USC §103(a) over Chevalier et al (U.S. Patent Application 2002/0192169). Applicants respectfully traverse.

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According to *In re Vaeck*, 20 USPQ2d 1438:

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.

The Office Action states that Chevalier discloses N-acyl amino acid compounds used in conjunction with an additional emulsifier. The Office Action states that the claim element of a dermatological carrier is met by the use of water. The Office Action concludes that the reference teaches the combination of the different components, therefore it is in the scope of the reference to pick and choose from different lists in order to produce a suitable composition for its suitable use.

Applicants assert that the cited reference fails to disclose the particular N-acyl amino acid claimed (N-acyl phenylalanine) at the levels currently claimed. Therefore, all elements of the claimed invention are not disclosed in the cited reference. Furthermore, applicants assert that the combination of N-acyl amino acid at the levels claimed and Vitamin B3 leads to surprising and unexpected permeation results (as described in the §132 Declaration of Gary Kelm); and therefore, it would not have been obvious to modify the disclosure of the cited reference to arrive at the claimed invention. Increased permeation of the skin of the composition leads to a higher concentration of the active at the desired site. Having a higher concentration of the active at the desired site, can lead to increased benefits, as a higher level of the active is present.

Rejection Under 35 USC §103(a) Over U.S. Patent Application 2005/0118119 in view of 2002/0192169

The Office Action rejects claims 1-10 over Stoltz in view of Chevalier. Applicants respectfully traverse.

The Office Action states that the primary reference (Stoltz) discloses that other actives may be used in the disclosed compositions including cosmetic active agents, vitamins and active agents with antimicrobial activity. The Office Action further states

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that Chevalier discloses Vitamin B3 is an active agent used in cosmetic compositions for its function as an anti-bacterial agent. Therefore Vitamin B3 not only acts as a vitamin but is suitable for cosmetic compositions as well as has antimicrobial activity.

Applicants assert that the cited reference(s) even when combined fail to disclose the Vitamin B3 at the levels claimed, in particular in combination with N-acyl phenylalanine at the levels claimed. Therefore, not every element of the claimed invention is taught. Furthermore, applicants assert that the combination of N-acyl amino acid and Vitamin B3, at the claimed levels, leads to surprising and unexpected permeation results (as described in the §132 Declaration of Gary Kelm); and therefore, it would not have been obvious to modify the disclosure of the cited reference to arrive at the claimed invention. Increased permeation of the skin of the composition leads to a higher concentration of the active at the desired site. Having a higher concentration of the active at the desired site, can lead to increased benefits, as a higher level of the active is present.

Conclusion

This response represents an earnest effort to distinguish the invention as now claimed from the applied references. In light of the above remarks, it is requested that the Examiner reconsider and withdraw the rejection under 35 U.S.C. 102(b) and 35 U.S.C. 103(a).

Respectfully submitted,

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